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Supreme Court of the United States

OCTOBER TERM, 1951

No. 388

LEROY J. ROBERTSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

N WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1951

CERTIORARI GRANTED DECEMBER 11, 1951

SUPREME COURT OF THE UNITED STATES

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[Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and Proceedings Before the Honorable Willis W. Ritter, Judge of the United States District Court for the District of Utah, Presiding in the Following-Entitled Cause:

No. 1558—Civil

LEROY J. ROBERTSON, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

AMENDED COMPLAINT—Filed June 12, 1950

Comes now the plaintiff in the above-entitled action and for his cause of action against the defendant above named alleges:

1. Plaintiff now is and was at all times hereinafter mentioned a resident of the State of Utah. That he is a taxpayer within the Internal Revenue District of the State of Utah.

2. That on or about the 15th day of January, 1948, the said plaintiff filed with the Collector of Internal Revenue for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income of $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income was the following, "Henry H. Reichold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be on said return, as follows: $161.58 by withholding from salary and $959.98 by check paid to said Collector of Internal Revenue for the District of Utah on or about January 15, 1948.

[fol. 2] 3. That attached to the aforesaid return of the plaintiff was the following statement, to-wit:

"In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000.00 to the

person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939 had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the taxpayer was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

"The taxpayer has submitted the facts in connection with this award to the Commissioner of Internal Revenue for a ruling as to the taxability thereof, and by letter dated January 8, 1948, the said Commissioner ruled that the entire award was taxable.

"The taxpayer believes that the Commissioner's ruling is in error on the basis of the decision of the Circuit Court of Appeals for the District of Columbia, in McDermott vs. Commissioner, 150 F.(2d) 585, and other rulings and decisions and intends to submit the matter further to the Commissioner on claim for refund or otherwise.

"Assuming but not admitting the Commissioner's ruling to be correct, the taxpayer claims the benefits of Section 107 Internal Revenue Code and has computed the tax as though the said $25,000 had been received ratably during the last 36 months in which he was engaged in composing the symphony, or during the years 1937, 1938, and 1939. [fol. 3] This computation shows a total tax for said years of $1,121.56, as follows:"

[Computation omitted.]

4. That on the 16th day of February, 1948, the plaintiff filed Claim for Refund of the said $1,121.56 with the said Collector of Internal Revenue for the District of Utah alleg-

ing that the claim should be allowed for the following reasons:

"'In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000 to the person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.'

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939, had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the taxpayer was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

"Neither Mr. Reichhold, the music award committee nor the Detroit Symphony Orchestra derived any profit from the contest or from the taxpayer's participation in it. The purpose as shown by the quotation in the first paragraph hereof, was to give, not to employ. This fact *inter alia* distinguishes the award made to the taxpayer from prizes offered in contests operated for commercial purposes.

"The award was not given by the donor to the taxpayer in exchange for the right to capitalize on his opus. The composition remained and remains the property of the tax-
[fol. 4] payer and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures etc., the right to first performance and the right to designate the publisher of the composition.

"The taxpayer's dominant motive in composing the 'Trilogy' was not in the hope of financial gain primarily. Like a great poet who is inspired to write an immortal poem, the taxpayer, desiring to make an outstanding contribution to the field of music, wrote this 'Trilogy' with no thought of entering it in a contest or otherwise commercializing on it and not until long after it was written was he prevailed

upon to enter it in the Reichhold contest and received eventually the prize-winning award.

"Under the decisions in McDermott vs. Commissioner, 150 F.(2d) 585 and Pauline C. Washburn, 5 T. C. 1333 the award received by the taxpayer does not constitute taxable income to him."

5. That more than six months have elapsed since the filing of said Claim for Refund.

6. That on or about October 24, 1949, the Commissioner of Internal Revenue assessed deficiency tax against this plaintiff for the year 1947 in the amount of $4,605.55, plus accrued interest of $444.34 or a total sum of $5,049.89. This tax and interest was paid to the Collector of Internal Revenue, Salt Lake City, Utah, on the 7th day of November, 1949.

7. The principal cause of the above mentioned deficiency was the taxing of the aforesaid award of $25,000.00 at the rates prevalent for the 36 months ending December 31, 1947, rather than at the rates used for the 36 months ending December 31, 1939, as shown on the return.

8. That on the 22nd day of November, 1949, the plaintiff filed an amended and supplemental claim for refund of $6,171.45 with the Collector of Internal Revenue for the District of Utah, alleging that the claim should be allowed for the following reasons:

[fol. 5] "In the year 1945 Mr. Henry H. Reichhold announced a contest in which he would award a prize of $25,000 to the person submitting the best symphonic composition to be determined by the Reichhold music award committee. The broad purpose underlying this contest, in the words of the donor, 'is the furtherance of a spirit of understanding and unity among the nations; and also to be helpful in bringing to the public the most important new music written in America.'

"The taxpayer, LeRoy J. Robertson during the years 1936, 1937, 1938, and 1939, had worked on the composition of a symphony entitled 'Trilogy' and had completed it in the latter part of December, 1939. This composition was entered in the contest by the taxpayer, was selected by the award committee as the best composition submitted and the

taxpayer was presented by Mr. Reichhold the award of $25,000 on December 14, 1947.

"Neither Mr. Reichhold, the music award committee nor the Detroit Symphony Orchestra derived any profit from the contest or from the taxpayer's participation in it. The purpose as shown by the quotation in the first paragraph hereof, was to give, not to employ. This fact *inter alia* distinguishes the award made to the taxpayer from prizes offered in contests operated for commercial purposes.

"The award was not given by the donor to the taxpayer in exchange for the right to capitalize on his opus. The composition remained and remains the property of the taxpayer and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures etc., the right to first performance and the right to designate the publisher of the composition.

"The taxpayer's dominant motive in composing the 'Trilogy' was not in the hope of financial gain primarily. Like a great poet who is inspired to write an immortal poem, the taxpayer, desiring to make an outstanding contribution to the field of music, wrote this 'Trilogy' with no thought of entering it in a contest or otherwise commercializing on it [fol. 6] and not until long after it was written was he prevailed upon to enter it in the Reichhold contest and received eventually the prize-winning award.

"Under the decisions in McDermott vs. Commissioner, 150 F. (2d) 585 and Pauline C. Washburn, 5 T. C. 1333 the award received by the taxpayer does not constitute taxable income to him.

"If any part of the said $25,000 constitutes taxable income to the taxpayer, the Commissioner has erroneously computed the amount of tax under Section 107 of the Internal Revenue Code and Section 29.107-2 of Regulations 111 by computing said tax as though the sum received was attributable to the years 1945, 1946 and 1947 rather than to the period preceding the taxable year in which the work on the composition was performed, to-wit; the years 1937, 1938 and 1939."

9. That more than six months have elapsed since filing of said amended and supplemental claim for refund; that

the Commissioner of Internal Revenue has not rendered a decision on said claim.

10. Plaintiff alleges that he had no taxable net income during the said year 1947 and that the said $25,000 was erroneously included in gross income in his said return and that the deficiency tax as above mentioned was erroneously computed and determined by the said Commissioner of Internal Revenue for the reasons set forth in the claims for refund hereinabove set forth.

Wherefore, plaintiff demands judgment against the defendant for the sum of $6,171.45 together with interest thereon as provided by law and for his costs and disbursements in this action.

LeRoy J. Robertson, Plaintiff. S. E. Blackham, Clyde D. Sandgren, Attorneys for Plaintiff.

(Duly verified.)

[fol. 7] Service (omitted in printing)

In United States District Court

Answer to Amended Complaint—Filed June 30, 1950

Now comes the defendant, United States of America, through its attorney, Scott M. Matheson, United States Attorney for the District of Utah, and answering the amended complaint:

1. Admits the allegations of paragraph numbered 1 thereof.

2. Admits the allegations of paragraph numbered 2 thereof except to deny that the plaintiff's income tax return for the calendar year 1947 was filed on January 15, 1948, and that the sum of $959.98 was paid on January 15, 1948.

Defendant affirmatively alleges that the plaintiff's income tax return for the calendar year 1947 was filed on February 5, 1948, instead of on January 15, 1948, as alleged by the plaintiff, and that the sum of $959.98 was paid to the Collector on January 22, 1948, instead of on January 15, 1948, as alleged by the plaintiff.

3. Admits the allegations of paragraph numbered 3 thereof but does not admit the allegations of the statement set forth in the said paragraph 3 and which statement was attached to the plaintiff's income tax return for the year 1947.

4. Admits that on February 16, 1948, the plaintiff filed a claim for refund of the amount of $1,121.56 with the Collector of Internal Revenue for the District of Utah setting forth in such claim the grounds for recovery, but the defendant denies each and every allegation so set forth in such claim for refund.

[fol. 8] 5. Admits the allegations of paragraph numbered 5 thereof.

6. Admits the allegations of paragraph numbered 6 thereof.

7. Admits the allegations of paragraph numbered 7 thereof.

8. Admits that the plaintiff filed an amended and supplemental claim for refund with the Collector of Internal Revenue for the District of Utah setting forth in such claim its grounds for recovery, but denies each and every other allegation of paragraph numbered 8 thereof and also denies each and every allegation set forth in such claim for refund.

9. Admits the allegations of paragraph numbered 9 thereof.

10. Denies the allegations of paragraph numbered 10 thereof.

Wherefore, the defendant prays for judgment dismissing the amended complaint together with the costs and disbursements of this action.

Scott M. Matheson, United States Attorney, Attorney for the Defendant.

IN THE UNITED STATES DISTRICT COURT

STIPULATION OF FACTS

[Paragraph 1 of the stipulation of facts is identical with paragraph 1 of the amended complaint, printed page 1.]

2. That on or about the 5th day of February, 1948, the said plaintiff filed with the Collector of Internal Revenue

for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income [fol. 9] was the following, "Henry H. Reichhold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be due on said return, as follows: $161.58 by withholding from salary and $959.98 by check dated January 15, 1948, which check was deposited by the said collector on January 22, 1948.

[Paragraph 3 to 9, inclusive, of the stipulation of facts are identical with paragraphs 3 to 9, inclusive, of the amended complaint, printed pages 2 to 6.]

[The filing date of the stipulation of facts is not set out in the typewritten record, although it appears it was filed on July 27, 1950. See printed page 80 this record.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed August 28, 1950

1. Plaintiff now is and was at all times hereinafter mentioned a resident of the State of Utah. That he is a taxpayer within the Internal Revenue District of the State of Utah.

2. The plaintiff is by profession a musician and composer, and at the present time is Professor of Music at the University of Utah. That during the year 1947 and for many years prior thereto he was similarly employed at the Brigham Young University, Provo, Utah.

3. During plaintiff's career in his profession he has composed many musical compositions, it having been his habit and custom upon the completion of one such composition to file it away and shortly thereafter commence another work. He completed a composition in the summer of 1936 and during the late summer or early fall of that year commenced work on a symphony which was to be called "Trilogy." He continued work on this latter composition in his spare time during the remainder of the year 1936 and through the years 1937, 1938 and 1939 and completed the

work during the latter part of December, 1939. Upon completion of this work it was also filed away by the plaintiff. [fol. 10] 4. In the year 1945 Mr. Henry H. Reichhold, an industrialist and apparently one of the important philanthropists of this country, and who was also president of the Detroit Symphony Orchestra, offered three awards of $25,000.00, $5,000.00 and $2,500.00, respectively, for the best symphonic works written by native-born composers of North, Central and South America. The purpose, terms, and conditions of the award are set forth in plaintiff's Exhibits No. 1 and 2, which by reference are made a part hereof. The broad purposes underlying the award are set forth on the title page of Exhibit No. 1 as follows:

"The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorius new work for full symphony orchestra by a native composer of the Americas.

"It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American Countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

"The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas."

5. After announcement of the contest the plaintiff was urged to enter his composition "Trilogy" but he did not do so as the original announcement (Exhibit 1) required that "parts must accompany each score." Plaintiff had had trouble with his eyes and felt that they would not stand the strain that would be entailed in writing the parts. However, when the "Amendments to the Reichhold Music Award [fol. 11] Contest Rules" (Exhibit 2) deleted the requirement that parts must accompany the score plaintiff decided to enter his composition and did so on or about February

18, 1946, by filing an official entry blank, a copy of which, as executed by the plaintiff is part of Plaintiff's Exhibit 1 attached hereto.

6. The compos-tion entered by the plaintiff was selected by the award committee, set up by Mr. Reichhold, as the best composition submitted and the plaintiff was presented by Mr. Reichhold the award of $25,000.00 on December 14, 1947.

7. The plaintiff, LeRoy J. Robertson, did not produce the composition "Trilogy" for the purpose of entering it in any contest neither for the purpose of selling it to Mr. Reichhold or to anybody else nor to produce income. It was the inspiration of an artist, his desire to do this creative work and was motivated dominantly and primarily for reasons other than monetary. On the other hand, Mr. Reichhold's purpose in announcing the contest and making the awards was to "give"—not to employ or to buy or sell and the award made to the plaintiff was not in exchange for the right to capitalize on his opus. The composition remained and remains the property of the plaintiff and he merely granted to the Detroit Symphony Orchestra synchronization rights as applied to motion pictures, etc.; the right to first performance and the right to designate the publisher of the composition.

8. On or about the 5th day of February, 1948, the said plaintiff filed with the Collector of Internal Revenue for the District of Utah at Salt Lake City, Utah, an income tax return for the calendar year 1947, in which he reported total income of $29,676.89, total deductions of $4,721.99, and a net income of $24,954.90. That included in gross income was the following, "Henry H. Reichhold—music award $25,000.00." That plaintiff paid the tax of $1,121.56 shown to be due on said return, as follows: $161.58 by withholding from salary and $959.98 by check dated January 15, 1948, [fol. 12] which check was deposited by the said Collector on January 22, 1948.

[Paragraphs 12 to 14, inclusive, of the findings of fact are identical with paragraphs 3, 4 and 6 of the amended complaint which are printed at pages 2 to 4.]

[Paragrahs 12 to 14, inclusive, of the findings of fact are identical with paragraph 7, 8 and 9 of the amended complaint which are printed at pages 4 to 6.]

Conclusions of Law

That the award of $25,000 to the plaintiff by Henry H. Reichhold in the taxable year constituted a gift and is not includible in plaintiff's income for the year 1947 or any other year, by virtue of the provisions of Section 22 (b) (3) of the Internal Revenue Code.

That the plaintiff is entitled to recover of and from the defendant the sum of $6,171.45 together with interest according to law.

By the Court:

Willis W. Ritter, Judge.

In United States District Court

Judgment

The Court having heretofore filed its Findings of Fact and Conclusions of Law herein and it being considered by the Court that the plaintiff should recover herein, in pursuance thereof, it is considered and adjudged by the court that the plaintiff above named do have and recover of and and from the defendant, United States of America, the principal sum of Six Thousand One Hundred Seventy One and 45/100 Dollars ($6,171.45), together with interest thereon as provided by law.

Done and adjudged at Salt Lake City, Utah, this 28th day of August, 1950.

[fol. 13] Willis W. Ritter, Judge.

Filed August 28, 1950.

Clerk's Note: Notation of entry of Judgment made on docket sheet August 28, 1950, in accordance with Rule 79 of Rules of Civil Procedure.

In United States District Court

Motion for New Trial—Filed September 5, 1950

Comes now the defendant, United States of America, and moves that the Court grant a new trial in this action upon the following grounds, to-wit:

1. That the Findings of Fact do not support the Conclusions of Law.

2. That the Conclusion of Law that the award of $25,000.00 to the plaintiff by Henry H. Reichhold in the taxable year constituted a gift and is not includible in plaintiff's income for the year 1947 or any other year is in error and against the law.

Scott M. Matheson, United States Attorney; Bryan H. Croft, Assistant United States Attorney.

Clerk's Note: Affidavit of Mailing by the United States Attorney's Office filed September 5, 1950.

In United States District Court

Minute Entry Denying Motion for New Trial—Dated September 29, 1950.

On this 29th day of September, 1950, plaintiff appearing by S. E. Blackham, his attorney, and defendant by Bryant H. Croft, Assistant United States Attorney, and the matter came on for hearing on motion for new trial. The court heard arguments of counsel and good cause appearing denied defendant's motion.

[fol. 14] In United States District Court

Notice of Appeal—Filed November 28, 1950

Notice Is Hereby Given that the United States of America, defendant above-named, hereby appeals to the Court of Appeals for the Tenth Circuit from the final judgment entered in this action on August 28, 1950 and from that order entered September 29, 1950 denying this defendant's

motion for a new trial, which motion was filed September 5, 1950.

Scott M. Matheson, Bryant H. Croft, Attorneys for Appellant, United States of America.

Clerk's Note: Copy of Notice of Appeal mailed by the Clerk of the United States District Court to counsel for the plaintiff in accordance with the Rule of Civil Procedure.

In United States District Court

Statement of Points—Filed February 7, 1951

The defendant above named, having appealed from the judgment made and entered herein, states that he intends to rely on appeal upon the following points, namely:

(1) That Finding No. 7 is not supported by the evidence.
(2) That Finding No. 7 is contrary to the evidence.
(3) That the judgment entered herein was contrary to the law and the evidence.

Done at Salt Lake City, Utah, this 7th day of February, 1951.

Scott M. Matheson, United States Attorney; Bryant H. Croft, Assistant United States Attorney.

Clerk's Note: Affidavit of Mailing by the United States Attorney filed February 7, 1951.

[fol. 15] In United States District Court

Order Extending Time in Which to File Record on Appeal—Filed January 7, 1951

Upon application of the defendant and appellant, United States of America, and good cause appearing therefor,

It Is Hereby Ordered that the defendant and appellant, United States of America, may have to and including the 27th day of February, 1951 within which to file and docket the record on appeal in the United States Court of Appeals, Tenth Circuit.

Dated this 5th day of January, 1951.

Orie L. Phillips, Judge, United States Court of Appeals, Tenth Circuit.

In United States District Court

Docket Entries Relating to the Proceedings

1-24-49—Complaint filed. Summons and copies issued. Summons filed showing service on U. S. Attorney and two copies mailed to Attorney General at Washington, D. C.

2-3-49—Return receipt signed by Attorney General filed.

3-25-49—Stipulation filed that defendant may have to and including May 24, 1949, in which to answer or otherwise plead. Order signed by Judge Johnson in accordance with stipulation.

5-24-49—Stipulation filed that defendant may have to and including June 24, 1949, in which to answer or otherwise plead.

6-12-50—Amended complaint filed.

6-30-50—Answer to amended complaint filed.

7-27-50—On motion of Bryant H. Croft, Mr. William Waldo admitted to practice for this suit. Case called for [fol. 16] pretrial. Issues summarized. Order to be prepared and presented for signature. Called for trial without a jury. Stipulation of facts filed and read into record. Documentary evidence introduced. LeRoy J. Robertson sworn and examined. Plaintiff rests. Defendant rests. Court heard arguments of counsel and hands down oral opinion in favor of plaintiff for $6,171.45 plus interest at legal rate. Findings of Fact, Conclusions of Law and Judgment to be prepared and presented for signature.

7-31-50—Reporter's transcript of oral decision filed.

8-3-50—Pretrial order signed by Judge Ritter and filed.

8-28-50—Direction to enter Judgment.

8-28-50—Findings of Fact and Conclusions of Law and Judgment in favor of plaintiff and against United States for $6,171.45 signed by Judge Ritter and filed. Notice of entry mailed to S. E. Blackham, attorney for plaintiff and U. S. Attorney.

9-5-50—Motion for new trial filed by defendant. Affidavit of mailing filed.

9-29-50—Called for hearing on motion for new trial. Court heard arguments of counsel and denied defendant's motion. Notice of entry mailed counsel.

11-28-50—Notice of Appeal filed by defendant. Copy of

notice mailed to S. E. Blackham, plaintiff attorney at Provo, Utah.

12-12-50—Reporter's transcript of testimony filed.

1-8-51—Order signed by Judge Phillips and filed extending time to docket appeal in the U. S. Court of Appeals, Tenth Circuit until February 27, 1951.

2-7-51—Statement of points filed by defendant. Defendant's designation of Record on appeal filed. Affidavit of mailing filed.

[fol. 17] In United States District Court.

Transcript of Trial Proceedings

Salt Lake City, Utah, Thursday, July 27, 1950: 10 A. M.

Appearances:

Mr. S. E. Blackham, attorney for plaintiff; Mr. William Waldo, Special Assistant to the Attorney General, Mr. Bryant S. Croft, Assistant United States Attorney, attorneys for defendant.

Mr. Croft: I would like to introduce Mr. William Waldo, Special Assistant to the Attorney General, and ask that he be associated with us in this case.

The Court: It may be done.

Statement

Mr. Blackham: If the court please, this is a tax case involving a claim for refund on behalf of the plaintiff, LeRoy J. Robertson, arising out of an assessment by the Commissioner of Internal Revenue of certain taxes upon income received by Mr. Robertson and including in income the sum of twenty-five thousand dollars which Mr. Robertson received in the year 1947 from the Reichhold Music Award Committee in connection with the Detroit Symphony Orchestra, having included that income of Mr. Robertson's in the year 1947.

It is our contention, if the court please:

First, that this award received by Mr. Robertson was not income as contemplated by the Revenue Code, Section 22,

and particularly was exempt under the provisions of Section 22-b, I believe, which exempts from the inclusion in income all gifts.

In preparing the return of Mr. Robertson we included in the return this twenty-five thousand dollars, with the notation on the return that this was included over our objection, that it was not income, and then we computed the income on the basis of what we thought were the provisions of Section 107 of the Internal Revenue Code, 107-b, which permits the allocation of income under certain circumstances back to the period of thirty-six months, with which your Honor is well acquainted, I am sure.

[fol. 18] Now, we will attempt to prove to the court here that the work on this musical composition out of which the twenty-five thousand dollar award arose was done entirely by Mr. Robertson, starting in the late summer or early fall of 1936, and being completed in its entirety in the latter part of December of 1939.

In computing the tax for the year 1947 we pushed that income back into the last thirty-six months of that period, so that it actually was pushed back into the years 1937, 1938 and 1939, and made our return on that basis, and paid the tax in the sum of eleven hundred dollars shown to be due on the return.

Shortly after that we filed a claim for refund with the Commissioner of Internal Revenue, and it was not acted upon within the six months period, so we filed suit in this court to recover that particular payment of the tax.

While this suit was pending the Bureau instituted an investigation of the tax and determined an additional assessment of some four thousand odd dollars, and that arose principally, with the exception of some five hundred dollars which were adjustments to which we agreed, the entire deficiency arose out of a computation of this sum of twenty-five thousand dollars, allocating it entirely to the years 1947, 1946 and 1945.

It will be our contention, if the court please, that in the first place the amount, or no part of it, is includible as income; that it was a gift within the contemplation of the Revenue Act, and was in fact a gift.

Secondly, that if it is includible in income, that the Bureau has now allocated that sum back to years which have

absolutely no relation whatever to the years in which the work was performed which brought in this twenty-five thousand dollars, and is contrary to Section 107 of the Internal Revenue Act, and is in fact contrary to the regulation 111 of the Treasury Department.

Now, we have agreed to certain formal facts, if the court [fol. 19] please, and we have prepared a statement of agreed facts, setting up those formal facts, leaving only, I believe,—at least from our standpoint, only the testimony of Mr. Robertson as to when this work was performed and the circumstances of submitting the matter, and as to whether there has been any other income received in connection with this work.

Is that fairly stated, from our standpoint, Mr. Waldo?

STATEMENT

Mr. Waldo: Yes, from your standpoint.

And of course I need only say, we intend to contest, on the evidence that we expect, the matter of whether it is a gift or not. We think it does not have all the common law requisite to make a gift.

And, secondly, we are contesting the application of Section 107-b as Mr. Blackham and his client are contending for it.

I may tell your Honor that Mr. Blackham and I were long-time colleagues in Washington when he was down there; we had offices adjoining. So it is a pleasure to me to have an opportunity to see him again, and it is kind of fun to practice law against him,—having so long been an advisor and advisee of Mr. Blackham in the office.

We understood that you were perhaps going to have a preliminary pre-trial here this morning. Mr. Croft told us your practice was to ask us, more or less, if we could, to agree on what the issues to be tried were. So we wrote out a paragraph——

The Court: Well, just state it. I suppose you have already stated those issues.

Mr. Blackham: Yes, I think so.

Mr. Waldo: They are really stated. You can make such issues here as you please.

[fol. 20] (Thereupon, on the statements of counsel, the issues were framed by the court as expressed in the pre-trial order on file herein.)

The Court: Now you have agreed on some facts. I suppose you will file a stipulation on that. I would like to have you read it to me. I am going to decide this case from the bench as soon as you get your case closed.

Mr. Blackham: (Reads from the agreed statement of facts herein.)

(Said statement of agreed facts is in words and figures as follows:)

[Paragraph 1 of the agreed statement of facts is identical with paragraph 1 of the amended complaint, printed page 1.]

[Paragraph 2 of the agreed statement of facts is printed at page 8.]

[Paragraphs 3 to 9, inclusive, are identical with paragraphs 3 to 9 of the amended complaint, printed pages 2 to 6.]

Mr. Blackham: Is it the practice to submit this in evidence?

The Court: Yes. File it.

No objection to the receipt of the stipulation, I assume?

Mr. Waldo: No objection, your Honor.

The Court: It may be received.

LeRoy J. Robertson, the plaintiff herein, called as a witness on his own behalf and having been first duly sworn herein, testified as follows:

Direct examination.

By Mr. Blackham:

Q. Will you state your name, please?

A. LeRoy J. Robertson.

[fol. 21] Q. Where do you reside, Mr. Robertson?

A. 1584 South Fourteenth East, Salt Lake City.

Q. What is your occupation?

A. I am head of the Music Department of the University of Utah.

Q. You are the plaintiff in this action, are you not?

A. I am.

Q. Now, are you the composer of a symphonic composition known as "Trilogy"?

A. I am.

Q. Now, will you tell the court under what circumstances you wrote that work and when that work was started?

A. That work was begun in the latter part of 1936, in the autumn. Of course there are sketches in the work which date some years previously. I hadn't kept track of when the sketches were written. But the intensive work on this composition was begun in the latter part of 1936, in the autumn. And I worked at it when I had any spare time from the time on to the end of the year 1939, at which time it was completed.

Q. May I ask this question. What fixes that date in your mind, Mr. Robertson? Is there any event that fixes the autumn of 1936 in your mind?

A. Yes. In the summer of 1936, I think it was in June, from June to July, I was at the University of Southern California as assistant with Armoe Schinberg (?). (Spelling) the great composer from Vienna, who had recently come to America.

The work I had with that man, the inspiration, whatever you wish to call it, seemed to have given me an urge to write this composition.

I recall distinctly that when I returned from California I received the proofs on my quintette——

Q. That was a prior composition?

A. That is a prior composition which was at that time being published. It was a prize-winning work, being published by the Society for the Advance of American Music. I have a copy of that work here, if you wish to inspect it.

And the dates that I corrected the proofs of that work as indicated on the printed material, the date was in 1936, [fol. 22] and I remember it was in about this time of the year, about August, that I corrected the proofs and sent them back, and immediately upon sending them back I had this impulse then to go with the Trilogy, and got working intensively on it.

Q. And what was your purpose in working on the Trilogy and composing it?

A. That I cannot say. I can not say why the sun comes up. Just an urge to do it. There was no purpose other than it seemed like it had to be done, that was all.

Q. I show you a bulky manuscript, Mr. Robertson, which appears to be the score of the Trilogy, and ask you if that is the composition?

A. Yes, that is a photostat of the original score.

Q. And as such, as it is, is this the way it was presented in the contest?

A. That is the score that went through the contest. It has the number 121, I think, on the front.

Q. And when did you say it was completed?

A. The work was completed in 1939.

Q. Now, the work on that composition was done during what period of time? Did you stay at it continuously, work all the time at it, or was it a sort of part-time undertaking?

A. Well, I was teaching. There were three children in the family. And our income wasn't too large. We had to live. And that was the first thing I had to take care of, naturally. But what time I had, most of the time I worked on this between the hours of ten in the evening and two o'clock in the morning.

Q. Now, did you have any commercial purpose in mind in composing that?

A. None whatever.

Q. Now, when the work was completed what did you do with it?

A. I put it aside and began a string quartette. And other work followed along in due course between that time and '46.

Q. Did you do any more work on the Trilogy?

A. No, I worked on these other compositions.

Q. What if anything in connection with this work occurred in 1945?

A. The announcement was made through the press that [fol. 23] Reichhold was giving this extraordinary award. And I checked through several works I had at the time, and the Trilogy seemed in certain respects to fit into the specifications better than anything I had at the time, so I thought of entering the Trilogy in the contest.

Q. Did you file an application with an official entry blank in the contest?

A. No. I asked for a blank. Then, on getting the blank it stated—the original blank—that parts would have to accompany the score. And in my student days in Boston I had over-worked my eyes so I had to be very careful with budgeting my eye-power, so to speak. So I decided then and there that there was no point in trying to even enter the Trilogy, because I couldn't get out the parts. There was no way of having the parts copied,—here, at least.

Q. Then what happened?

A. Then later an amendment to this original award came out stating that parts would not be required, that the score only would be required.

Then I made investigation as to having photostats made of the score, and on the completion of the information which helped me to adjust the price of the photostats, I decided to have them made.

(Plaintiff's Exhibits 1 and 2 were thereupon marked by the reporter for identification.)

Q. Mr. Robertson, I show you what has been marked Plaintiff's Exhibit 1, and ask you to tell the court what that is.

A. Well, just what it says. It was the Reichhold Music Award,—if that is what you mean.

Q. Is that an announcement or a setting forth of the provisions of the contest?

A. That is correct.

Q. Now, on the back of that appears to be an official entry blank. Now, did you sign a similar blank and turn it in to the contest committee with your Trilogy?

A. That is right.

Q. Now, this Exhibit 1 is not the original of that entry, is it?

A. I suppose Reichhold has that.

[fol. 24] Q. So this is a copy, as near as you can remember it is an exact copy of the original?

A. Yes. I think it includes these amendments, too.

Q. Plaintiff's Exhibit 2 are the amendments of which you speak?

A. That is right. Paragraph 4 says the parts must accompany each score. That was deleted from that.

Q. You submitted your official entry blank under date of February 18, 1946, as shown here on this copy, is that right?

A. There might be one or two days' difference there. I had a letter from Walberg (spelling?), who made the photostats of the work, saying the score had not yet reached them; they were a little anxious that it reach them. And my idea is the score must have crossed the letter, because I had already sent the score to them.

Q. But it was somewhere around that date?

A. Yes, it was near that time.

Mr. Blackham: If the court please, we offer in evidence Plaintiff's Exhibits 1 and 2, which are copies of the original entry blanks, and counsel and I have agreed that we will waive the originals.

The Court: Any objection?

Mr. Waldo: No objection.

The Court: May be received.

(Plaintiff's Exhibits 1 and 2 were thereupon received in evidence.)

Mr. Waldo: I believe I agreed with you that some statements in there might be taken as true, and you agreed with me——

Mr. Blackham: Yes. We have agreed that the allegations of Paragraph 10 in this Exhibit 1, in which it states the Detroit Orchestra, Incorporated, is a non-profit organization of Detroit, Michigan, is a fact, and also that Henry H. Reichhold is the president of the Detroit Symphony Orchestra, and that the purposes are as stated in this exhibit.

[fol. 25] The Court: Who put up the money?

Mr. Robertson: Reichhold, as far as I know.

The Court: Did he put it up as president of the Detroit Orchestra, or out of his own private funds?

Mr. Robertson: As far as I know, he put it up out of his own funds. He was interested in promoting the Detroit Symphony Orchestra.

As all symphony orchestras are, it was a liability finan-

cially for him; but he was president of it, and he was interested in it.

Mr. Blackham: It was a personal award as far as he was concerned.

The Court: What is his business?

Mr. Robertson: Reichhold? I think he has interests in chemicals and dyes throughout the world. He is an excellent violinist.

By Mr. Blackham:

Q. Do you know Mr. Reichhold?

A. I met him when I was in Detroit. I think I met him probably on December 12, 1947, for the first time. My acquaintance with him was on December 12, 13 and 14th of December.

Q. Under what circumstances was that?

A. That is the time I went to receive the award. The work was performed on Thursday, December 11th, in concert, on Friday, December 12th in concert, then was broadcast on December 14th, so it was right in there while I was in Detroit.

Q. The work was performed by the——

A. —Detroit Symphony Orchestra under Karl Krueger.

Q. Do you know whether or not that orchestra is still in existence, Mr. Robertson?

A. No, it is not in existence now.

Q. Do you know when it ceased to be?

A. As I remember, at the end of the season of 1948.

Q. Now, prior to this December 14, 1947, had you received any money from any source whatever in connection with this Trilogy?

A. No, none whatever.

[fol. 26] Q. Subsequent to the receipt of the twenty-five thousand dollars have you received any money in connection with it from any source or for any purpose whatever?

A. No, it has just cost me a little bit. I mean by that, I sent this score to one or two conductors and have sent the score and parts on to Brazil.

Q. Where is the original score at the present time?

A. It is in Brazil,—in Rio de Janeiro.

Q. Tell the court what were the circumstances of taking that there.

A. Last October, I think it was, I received a letter which you have, from some part of the Department of State—isn't that on the envelope? Isn't it from the Department of State officially? Asking that this work be sent to Brazil for performance there.

Q. Pursuant to that request from the State Department, did you send it for that purpose

A. Yes.

Q. Have you received any emoluments at all from that?

A. No, I don't think it has been performed yet. They told me they would send me the clippings when it was done. At the present time I haven't received any clippings. I don't believe they have had time to work it up. They were so close to the end of their season last year. They are in the midst of their season now, so I am hoping they will get around to it. It is up to them.

Q. Did you have any agreement with any person or society that you should be reimbursed in any sense for this work in that connection?

A. None whatever, except since this went I have become a member of ASCAP—American Society of Composers and Publishers. They generally ask a certain amount from all symphonic orchestras; the symphonic orchestras pay a small fee in through ASCAP for the right to perform works of the members.

Since this was sent to Brazil I have become a member of ASCAP. Whatever it is, it will be very little.

Q. At any rate, there has been no promise of any payment to you in that connection?

A. No.

[fol. 27] Q. Have you composed any other works than the Trilogy?

A. Yes, several. Do you wish me to name some of them?

Q. Have you composed any of those works on a commission basis,—that is, commission to do a particular work for a particular purpose and for pay?

A. Only one, and in a sense it was not a commission. That was last year, for the University of Utah, about a year ago now, the administration asked that I prepare an original work for the convocation. And in going over my sketches and work under way I chose a violin concerto.

I asked that I might have five hundred dollars to help with these parts and score and piano reduction. I received that from the Research Foundation of the University of Utah.

My account shows I put about that much money in on it, too.

Q. That is the only time in connection with any of the compositions you have done that you have received any money for?

A. That is right—pardon me, I received a gift of three hundred and fifty dollars on a piano rhapsody in 1945, I think, or 1946 or 1947.

Q. Except that one, you never started work on any composition or have been commissioned to do so with the expectation of getting funds?

A. That is correct.

Q. Do you know whether or not the Trilogy has been synchronized to motion pictures?

A. No, it has not.

Q. Has it been recorded for phonograph?

A. Only private recordings, not commercial.

Q. Any electrical transcriptions on music rolls made of it?

A. No. It has been recorded on records and then on tape.

Q. By private individuals? Has that been done by the Detroit Orchestra, do you know, any of those things?

A. They gave me—I have it in my possession,—a record of the Thursday night performance on December 11th, I think it was, 1947.

Q. But there have not been any recordings or synchronizations for commercial purposes?

A. That is correct.

[fol. 28] Q. Now, Mr. Robertson, Exhibit No. 1 sets forth the terms under which you entered the contest, is that right?

A. That is right.

Mr. Blackham: I believe that is all.

Cross-examination:

By Mr. Waldo:

Q. Mr. Robertson, I think we all understand what a painter means when he speaks of a "sketch",—but just what does a "sketch" in your terminology mean?

A. Well, I suppose the first definition of it would be, perhaps, a melody with certain notations of harmonic voices to accompany it; a motif or something like that.

Q. A theme?

A. We call it a motif; sometimes it is a little longer. We call it a melody.

Q. These things come to you in the way of ideas from time to time, and you just put them down for future use, is that it?

A. Correct.

Q. So that when, as you said, you were commissioned to do something for the convocation, you got out your file of sketches and ran over them to see which of those was most appropriate, and then began to use that material?

A. That is correct in the case of this work you refer to, the violin concerto, because it was well along when they asked for it. One movement, at least, was entirely composed out of the three.

Q. Then when you started this work, you fix the time as when you completed a previous work in the summer of 1936, you already had this file of motifs or sketches that you could begin to review and see what would be appropriate for use in the Trilogy?

A. That is right. That material I looked through. Those things generally come to you without looking through all that may be written. You get leads through your mind, something that is stored in your mind, as well as in your file. Then I consulted some of those files, no doubt. It would be difficult to tell you just how it went about.

Q. Are you one of those happy individuals who has [fol. 29] what musicians call a perfect pitch?

A. No, just approximate that—I think I could come quite close to it; but much more concerned about relative pitch.

Mr. Waldo: I happened to run into that phenomenon once when I was a young man, and I know something about it as a consequence.

The Court: That has not any bearing on this lawsuit.

By Mr. Waldo:

Q. The score had been put away in some fashion at the end of 1939?

A. That is right. It was put in a cupboard.

Q. Ever do any further correcting or changing on it from time to time after that?

A. No. I was busy with other work.

Q. When you decided to enter the contest and see whether it was appropriate, did you make any changes at that time?

A. No.

Q. You submitted it then exactly in the form as when you put it away in 1939?

A. That is right.

Q. I wonder about the significance of these pencil notations. I notice in this score as shown to you by your counsel, for instance what do these X's indicate on this page which I point to you?

A. This indicates at the Salt Lake performance of the Trilogy—that was after the one in Detroit—that we eliminated that measure.

Q. Here is a little notation on the top of another page, and in the middle of "Tempo," I imagine where you decided to change the indicated tempo to another,—is that it?

A. That is right. After having heard about four of five performances of the Trilogy, these were some things I think that have gone into the score to Brazil.

Q. In the score as submitted for the contest it was without that pencil notation?

A. Correct. There was no pencil notation in the score. You can't photostat pencil. If you wish to apply your eraser it will come off. If you photostat it you would have to scrape it off, I imagine.

Q. Here is a page, again, that seems to be scratched up. [fol. 30] A. That was two measures eliminated at the Salt Lake performance.

Q. As concerns the question the court asked you, about the way the money was put up by Mr. Reichhold, as a person or as president of the orchestra, I assume from your answer you really don't know,—it is hearsay as to what you said?

A. Is there anything in the magazine that would give you any clue how it was?

Mr. Waldo: The magazine article would be hearsay, too, I take it, unless you know it of your own knowledge.

A. I really couldn't say. All I know in general is that Mr. Reichhold was giving all he could to sustain the orchestra.

Q. But as far as you are concerned, you haven't any actual knowledge of your own as to that point?

A. I couldn't say whether he got his money from the Detroit Symphony or whether he gave it himself. I would be quite inclined, however, to say that Mr. Reichhold gave that money out of the Reichhold Foundation. Doesn't it say so there some place, "Reichhold Foundation"?

Mr. Waldo: If it does, it speaks for itself in the exhibit. I was just trying to find out if you had any personal knowledge of where the money came from.

Q. Mr. Robertson, do you remember at any time talking to Revenue Agent Galligher, who sits here in the court room?

A. Yes, sir.

Q. About this matter. And what were the circumstances of those conversations?

A. Mr. Galligher came to check on the income tax return filed in relation to this matter, and the income of that particular period.

Q. I asked you a moment ago whether you had done any changing in this work before it was submitted to the award, and you answered "No." Do you remember a conversation with Mr. Galligher in which you gave a different answer to that question?

A. No, I do not.

Q. Do you remember telling him substantially that you made a change in the ending and other bits just before submission?

A. I don't remember that.

[fol. 31] Q. And you now say that it would not be correct?

A. Well, I would like to hear Mr. Galligher's statement on it. I might say this much in relation to it, that if anything was said there, that I made an alternate page in 1939 for this work,—composed it. There were two endings—not two endings—an alternate page just before the ending, and I transferred that page to this copy.

The two endings were written in 1939. It didn't mean any work except transference.

Q. We are striving for accuracy.
A. Well, that would be accurate.

Mr. Waldo: I think that is all.
Mr. Blackham: That is all. That is our case, if the court please.
The Court: All right, Mr. Waldo.
Mr. Waldo: The defendant rests, too.
The Court: All right, I will hear you gentlemen on your legal proposition.

(Argued by counsel for the respective parties.)

ORAL OPINION OF THE COURT

The Court: There is not any question but that Reichhold got no advantage or benefit. There is not any question here, I think, on the record, but that Reichhold intended to award this money to encourage the production of compositions with a view to whatever influence that might have on unity between nations, and for the purpose of encouraging and developing the best American type of music.

It would seem to me there is no question on this record but that the Detroit Symphony Orchestra did get some benefit and advantage; it got a right to play the thing the first time; it got the right to synchronization and mechanical reproduction.

On the other side of it, Mr. Robertson certainly did not compose this production for the purpose of obtaining the [fol. 32] Reichhold award, because his composition was completed in 1939 and he did not enter into the award contest until February 18, 1946. So when he composed this music, rendered this service, he certainly wasn't doing it for this reward, and I think on the record it is highly dubious that he was doing it for any reward other than the satisfaction that comes to an artist from doing those things. Sure, they all hope, inventors, artists, musicians hope that some time this sort of thing will happen to them. I suppose he hoped about the mechanical reproduction and so forth, that that might develop some income. That has not been realized as yet. His composition has been played, according to his testimony, three times; otherwise it has remained in a file somewhere. This kind of composition cannot be produced

without a very expensive symphony orchestra to put on the production. Mr. Robertson received that advantage, but he received that advantage from the Detroit Symphony Orchestra, not from Mr. Reichhold. From Mr. Reichhold he got twenty-five thousand dollars. From the Detroit Symphony Orchestra he got the production of his Trilogy, and I wouldn't be surprised but what Mr. Robertson, or any composer, would regard an opportunity to have his composition played for the first time so he could hear it would seem to him to be about as valuable as the twenty-five thousand dollars.

In return for what the Detroit Symphony Orchestra did they got some advantages: they got the opportunity to play it first; they got the rights spoken of for synchronization and mechanical reproduction, perhaps motion picture rights.

Fundamentally I think this boils down to the question: Was Mr. Reichhold giving, or was he selling? I think it boils down to the question on the other side: Was Mr. Robertson giving, or was he selling?

I do not believe Reichhold or the Reichhold Award Committee was selling anything or buying anything. I think they were giving. I think that was the intention. Appar- [fol. 33] ently Reichhold is one of the important philanthropists of our country. Mr. Robertson says he is engaged in the chemical and dye business all over the world; apparently a man of means, because he is underwriting the activities of the Detroit Symphony Orchestra, has an interest in music, in a philanthropic way attempting to develop good music.

I think the finding should be that Reichhold intended to give, not to buy or sell. I think the finding on the other side should be that Mr. Robertson did not produce this composition for the purpose of selling it to Mr. Reichhold or to anybody else. It was the inspiration of an artist, his desire to do this creative work.

I was interested in the way he expressed it here in a modest sort of way; he hadn't been asked apparently before how he came about doing it, but he said it was just something that had to be done. If creative artists of Mr. Robertson's kind were doing these things only with the expectation of reward I think they would go down town in trade to render their services, because most of them don't ever get very

much for this sort of effort. As a matter of fact the record shows he has not gotten very much for it; it cost him some of his prize money to send it around to publishers and conductors of other symphony orchestras.

I believe that Mr. Robertson's production of this composition was motivated dominantly and primarily for reasons other than monetary. When he entered into this contest I don't think he was intending to sell his production or rights in it; I don't think he was intending to sell his services. I think he was intending to place himself in a position where he might, if he was lucky, be the recipient of a prize award which, on the other side, was intended to be a gift.

I think if there is any exchange of values here, the exchange of values is between the Detroit Symphony Orchestra and Mr. Robertson, and that exchange of values hasn't anything to do with the twenty-five thousand dollar prize. Consideration both ways there. Mr. Robertson got his production played,—a very important advantage to him,—it [fol. 34] cost somebody a lot of money to play that thing; they played it three times, two productions without the radio, then a radio broadcast production. That is a very valuable thing, in return for which the symphony orchestra gets the rights to which the official entry blank refers.

I believe it is the kind of thing—difficult as it is to draw the line—that falls on the side of giving rather than of selling or buying of either services or compensation.

The judgment will be for Robertson for a refund.

Mr. Waldo: There is not any question at all, however, is there, your Honor, that the award committee made the application which is in evidence?

The Court: Oh, no. I am taking the whole record into account in making this decision.

Now, do you want to say anything to me about the money, or are you going to get together and compute that?

Mr. Waldo: It must be about adjournment time——

The Court: We will adjourn when we get through. What normally we would do, we would render judgment in a definite amount of money. You haven't arrived at that yet?

Mr. Waldo: Then can we have a recess for ten minutes?

The Court: Recess for ten minutes.

(After the recess:)

Mr. Blackham: If the court please, the agreed statement of facts shows the amount of tax that was paid, tax and interest of $6171.45, and under the computation here we have agreed that the full amount of the taxes paid for the year are refundable, so the judgment should be for $6171.45.

The Court: Plus interest from the date of payment at the rate of six per cent?

[fols. 35-36] Mr. Waldo: According to law, if you will?

The Court: That is what it is?

Mr. Waldo: Yes.

The Court: Well, according to law.

Mr. Waldo: Then you have both your date of payment and the rate taken care of automatically.

The Court: All right. You agreed to that amount, do you, Mr. Waldo?

Mr. Waldo: The revenue agents assure me there is no taxable income if the award was not taxable, so that would mean the whole amount of tax paid was overpayment.

The Court: The judgment will be for the amount Mr. Blackham states, with interest according to law, as Mr. Waldo suggests.

Mr. Waldo: I suppose you will draw the judgment and submit it to Mr. Croft.

The Court: Prepare your findings and conclusions and judgment and bring them in to me, and before you bring them in go over them with Mr. Croft. If he has any objections that you cannot resolve between yourselves, bring them in to me and I will resolve them for you.

Reporter's Certificate (omitted in printing).

PLAINTIFF'S EXHIBIT No. 1

33

Return to
L. E Blackham
48 No. University Ave.
Provo Utah

REICHHOLD

MUSIC AWARD

SYMPHONY OF THE AMERICAS 1945

The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of searching out the most meritorious new work for full symphony orchestra by a native composer of the Americas.

It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan American countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prizes. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations, and also to be helpful in bringing to the public the most important new music written in the Americas.

President of the Detroit Symphony Orchestra

DETAILS OF THE AWARD

Henry H. Reichhold offers the following three awards for the best symphonic works, to be selected as outlined hereafter, written by native-born composers of North, Central and South America:

First Award	$25,000
Second Award	$5,000
Third Award	$2,500

It is planned that each work receiving one of these awards will be broadcast by the Detroit Symphony Orchestra within one year from the date of the award.

In addition, a Certificate of Merit will be awarded to the one outstanding selection from each participating country.

ELIGIBILITY: The Reichhold Music Awards for symphonic composers are open to persons born in the Western Hemisphere and who are citizens of one of the following countries.

Argentina	Colombia	Guatemala	Panama	United States
Bolivia	Costa Rica	Haiti	Paraguay	(Inc. Alaska,
Brazil	Cuba	Honduras	Peru	Puerto Rico &
Canada	Dominican Republic	Mexico	Salvador	Virgin Islands)
Chile	Ecuador	Nicaragua	Uruguay	Venezuela

A candidate must be prepared, if required, to submit documentary evidence of fulfilling the foregoing requirement.

These awards are open to all such composers who agree to the terms and conditions as set forth on page three hereof and who submit their work in the manner therein described.

NATURE AND LENGTH OF WORKS: The awards are offered for compositions written for full symphony orchestra, the duration of which work will be not less than 20 minutes nor more than 35 minutes. (Five minutes leeway, however, will be permitted if the quality of the work, in the opinion of the judges, merits it.) The theme of such compositions is left entirely to the composer.

JUDGING: Compositions must first be submitted to a National Preliminary Award Jury in each individual country participating; members and headquarters of these juries will be announced publicly in the near future. These juries, composed of musical authorities in the various countries, will be approved by the Reichhold Music Award Committee. Decision of each National Preliminary Award Jury shall be final and can not be contested except by the International Award Jury.

The one symphonic work chosen by each Preliminary Award Jury to represent that country will be awarded a Certificate of Merit and entered in the final international judging for the prizes and honorable mention awards. Members of this final board will be selected by the Reichhold Music Award Committee from prominent music authorities whose names will be publicly announced. Karl Krueger, music director of the Detroit Symphony Orchestra, will, however, be chairman.

In both the National and International judging, preliminary selection from entries may be made by a committee appointed by the judges for the purpose of evaluating the compositions. Decisions of the International Award Jury shall be final and can not be contested.

No member of any of the aforesaid juries shall be eligible to enter the contest.

CLOSING DATE FOR ENTRIES: All entries must be in the hands of the National Preliminary Award Jury of each country by September 1, 1945. Addresses of these juries will be publicly announced in the local press.

ANNOUNCEMENT OF THE WINNERS: Announcement of the winners of the national awards will be made November 1, 1945, or as soon thereafter as the judges reach a decision. Awards in the final contest will be announced March 1, 1946, or as soon thereafter as the judges reach a decision.

HONORABLE MENTION: In addition to the three awards, Honorable Mention may be awarded to any composition entered in the final judging, which in the opinion of the jury merits such recognition.

IMPORTANT: Only works submitted according to the terms and conditions set forth on page three hereof will be entered for the consideration of the juries. In order that all compositions may be considered on a uniform basis, it is necessary that each candidate obtain an Official Entry Blank (see page 4) and that this be properly completed and sealed in the Official Envelope provided for that purpose. Only compositions accompanied by this Official Envelope properly completed with enclosures, will be considered for the Reichhold Music Award, 1945.

Any composition received without the required Official Envelope will be returned to the composer together with an Official Entry Blank and Official Envelope in order that the composition may be resubmitted in the required manner. In such cases this procedure will be followed without divulging the composer's identity to the juries.

39-40

PLAINTIFF'S EXHIBIT No. 1

35

TERMS AND CONDITIONS

1. Candidates must have been born in the Western Hemisphere and must be a citizen of one of the following countries:

Argentina	Haiti
Bolivia	Honduras
Brazil	Mexico
Canada	Nicaragua
Chile	Panama
Colombia	Paraguay
Costa Rica	Peru
Cuba	Salvador
Dominican Republic	United States
Ecuador	(inc. Alaska, Puerto Rico & Virgin Islands)
Guatemala	Uruguay
	Venezuela

2. The awards are offered for compositions fully scored for a symphony orchestra.

3. Playing time of entire composition should be not less than 20 minutes nor more than 35 minutes. (Five minutes leeway, however, will be permitted if the quality of the work, in the opinion of the judges, merits it.)

4. Compositions must be legibly written in ink and parts must accompany each score.

5. Compositions must not have been published or publicly performed, either in full or in part, prior to entry in this contest.

6. A candidate may submit only one work. Such work must be submitted with an Official Entry Blank, wrapped flat, postage prepaid.

7. Candidates must submit their compositions to the Preliminary Award Jury in the country of their citizenship not later than September 1, 1945.

8. The score MUST BE SIGNED WITH A PSEUDONYM OR MOTTO, AND MUST BEAR NO MARKINGS THAT WOULD REVEAL THE IDENTITY OF THE COMPOSER. Attached to the score MUST be an Official Envelope duly completed and containing an Official Entry Blank duly completed. Envelopes will not be opened until after the juries have made their decision. Candidates are urged to retain copies of their manuscripts.

9. The final decisions will be rendered by a jury of internationally known music authorities, under the chairmanship of Karl Krueger, such jury to be named by the Reichhold Music Award Committee.

10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award.

Inquiries as to terms and conditions should be addressed to the Reichhold Music Award Committee, Room 4315, 30 Rockefeller Plaza, New York 20, New York.

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Official Entry Blank

REICHHOLD MUSIC AWARD

SYMPHONY OF THE AMERICAS 1945

To the Reichhold Music Award Committee:

Date Jan 18, 1946

1. I, the undersigned (represented by the pseudonym or motto ....NOSTREBOR....), submit herewith a composition entitled ....TRILOGY.... for the purpose of participating in the Reichhold Music Award, 1945 upon the terms and conditions printed on the reverse side of this blank.

2. I agree that it shall be judged by any committee or committees selected by you whose decision shall be final.

3. I warrant that I am the sole composer of this composition, that it is an original work, and that it has never been published or publicly performed, either in part or in full.

4. I understand that the composition submitted by me shall remain my property except that, should I win one of the three Cash Awards, I grant to the Detroit Orchestra, Inc., all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

5. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the first performance rights of said composition in each or all of the countries named on the reverse side of this page.

6. In the event that this composition receives one of the three Cash Awards, Honorable Mention or a Certificate of Merit, I grant to the Detroit Orchestra, Inc., the right to designate the publisher of said composition.

7. In order to facilitate judging, I grant to the Reichhold Music Award Committee the right to make copies, by photostat or other means, of the composition submitted by me.

8. I understand that three awards will be made as follows:

First Award	$25,000
Second Award	$5,000
Third Award	$2,500

9. I understand that Honorable Mention may be awarded to any composition not receiving one of the above awards.

10. I understand that a Certificate of Merit will be awarded to the composer of the winning composition in each participating country and that these winning works will then be forwarded for final judging in New York City.

11. I understand that you intend to return the composition to me after the announcement of the awards and to use due care in protecting it while it is in your custody but I hereby release you from any and all claims and demands arising out of the loss or destruction of said composition, however caused.

12. I hereby agree to indemnify and save harmless Henry H. Reichhold, Karl Krueger, the Detroit Orchestra, Inc., the radio network and stations over which such composition is broadcast, and the sponsor of such broadcast and its agency, the persons, firm or corporation making or selling any recording of such compositions, and each of them from any loss, liability, or expense resulting from any claim or litigation arising out of the recording, performing or broadcasting of such composition, provided, however, that I shall not be required to indemnify such orchestra, network or station for any loss, liability or expense resulting from any performance given without license from any performing right society of which I may be a member if such license shall be available to such orchestra, network or station, as the case may be.

13. I agree to execute and deliver to the Detroit Orchestra, Inc., any documents which it may deem necessary for the purposes set forth in paragraphs "4," "5" and "6" hereof.

14. If I am a member of any society of composers and/or have assigned any rights or have given any licenses contrary to those conveyed in paragraphs "4," "5" and "6," I agree that, should my composition be tentatively selected to receive one of the Cash Awards, I shall obtain a release from such assignment or license insofar as they are at variance with paragraphs "4," "5" and "6" and if I fail to furnish the same within 60 days, after notice to me, I shall be automatically eliminated from the contest.

15. I have read the terms and conditions printed on both sides of this entry blank and hereby agree to all the stipulations thereof, and I warrant that I was born in the country of ....USA.... and am a citizen of ....USA....

Name ....Leroy Robertson....

Address ....550 4th E.... (Post Office)

....Provo, Utah....

Signature ....Leroy Robertson....

Entries from the United States, Alaska, Puerto Rico and the Virgin Islands shall be sent to:
The Reichhold Music Award Committee, Room 4315, 30 Rockefeller Plaza, New York 20, New York.

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PLAINTIFF'S EXHIBIT No. 2

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Amendments

TO THE

REICHHOLD MUSIC AWARD CONTEST RULES

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Due to various war time restrictions, censorship regulations and delays, and to many requests from numerous countries concerned, the Reichhold Music Award Committee has decided to amend the Official Rules and Entry Blank of the Symphony of the Americas Contest in the following particulars only:

PAGE 2, under NATURE AND LENGTH OF WORKS; *the last sentence should read:* "The form of such compositions is left entirely to the discretion of the composer except that they must be works for orchestra alone, and may not be concertos for solo instruments or choral works. It is suggested that composers include metronome markings."

PAGE 2, under JUDGING; *delete:* "and cannot be contested except by the International Award Jury."

change: "The one symphonic work . . ." to "The three symphonic works . . ."

Delete the sentence: "In both National and International judging, preliminary selection from entries may be made by a committee appointed by the judges for the purpose of evaluating the compositions."

PAGE 2, under CLOSING DATE FOR ENTRIES; and on Page 3, paragraph 7, *change:* "September 1, 1945" to "March 1, 1946".

PAGE 2, under ANNOUNCEMENT OF THE WINNERS; *change:* "November 1, 1945" to "June 1, 1946" and "March 1, 1946" to "September 1, 1946".

PAGE 3, Paragraph 4, *delete:* "and parts must accompany each score".

PAGE 3, Paragraphs 10 and 12; and Page 4, Paragraph 6, *delete:* "Honorable Mention or a Certificate of Merit".

PAGE 3, Paragraph 11; and Page 4, Paragraph 5, *add the sentence:* "Performance fees will be agreed upon between the Detroit Orchestra, Inc. and the composer"

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45=46

[fols. 47-48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] Argument and Submission—June 4, 1951 (omitted in printing)

IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION—July 10, 1951

Ellis N. Slack (Theron Lamar Caudle, Assistant Attorney General; Harry Baum, Special Assistant to the Attorney General; Scott M. Matheson, United States Attorney; and Bryant H. Croft, Assistant United States Attorney, were with him on the brief) for Appellant. S. E. Blackham (Sandgren and Blackham, on the brief) for Appellee.

Before Bratton, Murrah, and Pickett, Circuit Judges

PICKETT, Circuit Judge:

This appeal is taken from a judgment of the United States District Court for the District of Utah, which held that a sum of $25,000 received by the appellee, Leroy J. Robertson, herein referred to as the taxpayer, as a prize in a contest was not taxable income.

The facts necessary to a decision are not in dispute. In 1945, Henry H. Reichhold, an industrialist and philanthropist, as President of the Detroit Orchestra, Inc., offered three awards: $25,000, $5,000 and $2,500, respectively, for the best symphonic compositions written by native-born composers of North, Central and South America. As an- [fol. 50] nounced in the terms and conditions of the contest, the underlying purpose was to further a spirit of understanding among the Pan-American nations and to bring to the public the best new music written in the Americas.[1]

[1] The announced purpose was:

"The belief that good music is a force which bridges the distances and differences between the people of various nations has moved us to establish a contest among the composers of the western hemisphere with the object of search-

There were also certain published conditions which each contestant was required to agree to upon entering the contest.[2]

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ing out the most meritorious new work for full symphony orchestra by a native composer of the Americas.

"It is the plan of the Reichhold Music Award Committee first to sponsor preliminary contests in each of the twenty-one Pan-American Countries, including Canada. The winning compositions of these national series will then be entered in the competition for the grand prize. The world premiere of those works receiving the grand prize is scheduled to be played by the Detroit Symphony Orchestra, conducted by Karl Krueger.

"The broad purpose underlying this contest is the furtherance of a spirit of understanding and unity among the Nations; and also to be helpful in bringing to the public the most important new music written in the Americas."

[2] These terms and conditions were in part:

"10. Each composition receiving a Cash Award, Honorable Mention or a Certificate of Merit shall remain the property of the composer except that he shall be required to grant to the Detroit Orchestra, Inc., a non-profit organization of Detroit, Michigan, all synchronization rights as applied to motion pictures and all mechanical rights as applied to phonograph recordings, electrical transcriptions and music rolls.

"11. The Detroit Orchestra, Inc., also must be granted the exclusive right to authorize the first performance for each or all of the above-named countries of compositions receiving Cash Awards, Honorable Mention or Certificates of Merit.

"12. The Detroit Orchestra, Inc., shall also be granted the exclusive right to designate the publishers of compositions winning Cash Awards, Honorable Mention or Certificates of Merit.

"13. The Detroit Symphony Orchestra plans to give at least one broadcast performance of each work receiving a Cash Award within one year from the date of the award. Each work receiving an Honorable Mention or a Certificate of Merit may be given at least one broadcast performance within one year from the date of the award."

During the years 1937, 1938 and 1939, the taxpayer, a musician and composer by profession, had composed a symphony called "Trilogy" which was unpublished and placed in his files. This composition was the result of a personal desire to compose a symphony and at the time was not done for the purpose of sale or profit. Upon learning from press releases of the attractive and extraordinary awards offered, the taxpayer took "Trilogy" from his files and entered it in [fol. 51] the contest. On December 14, 1947, he was awarded and received the $25,000 prize. In his income tax return for that year the taxpayer included this $25,000 in his gross income. He claimed the benefits of Sec. 107 (b) of the Internal Revenue Code[3] and in so doing computed the tax as though the $25,000 had been received ratably during the years 1937, 1938 and 1939. Later he filed a claim for refund of the tax paid as a result of the award money on the ground that it constituted a gift and was not taxable.

The Commissioner assessed a deficiency on the theory that

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[3] 26 U. S. C. A. 107 (b). "For the purposes of this subsection, the term 'artistic work or invention,' in the case of an individual, means a literary, musical, or artistic composition of such individual or a patent or copyright covering an invention of or a literary, musical or artistic composition of such individual, the work on which by such individual covered a period of thirty-six calendar months or more from the beginning to the completion of such composition or invention. If, in the taxable year, the gross income of any individual from a particular artistic work or invention by him is not less than 80 per centum of the gross income in respect of such artistic work or invention in the taxable year plus the gross income therefrom in previous taxable years and the twelve months immediately succeeding the close of the taxable year, the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over that part of the period preceding the close of the taxable year but not more than thirty-six calendar months."

the amount received represented taxable income and that the tax liability should have been computed under Sec. 107 (b) as though the $25,000 had been ratably received over the three year period, 1945, 1946 and 1947. The deficiency as established was paid and suit was brought for the refund. The District Court concluded that the cash prize was a gift as defined by 26 U. S. C. A. 22 (b), (3), and should not be included as gross income under Section 22 (a) of the Internal Revenue Code.[4]

[fol. 52] Sec. 22 (a) broadly defines gross income and by its sweeping terms it is evident that Congress intended that income should be taxed comprehensively and in so doing intended to exercise to the "full measure" its constitutional power. Helvering v. Stuart, 317 U. S. 154, 169; Helvering v. Clifford, 309 U. S. 331, 334; Douglas v. Willcuts, 296 U. S. 1, 9; Irwin v. Gavit, 268 U. S. 161, 166. Under this Section all income is taxable unless specifically excluded by other provisions of the statute. Sec. 22 (b), (3), excludes gifts from the income tax provisions but in view of the general purpose to tax, all income, specific exemptions should be strictly

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[4] 26 U. S. C. A. 22:

"(a) General Definitions.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

(3) Gifts, bequests, devises and inheritances.—The value of property acquired by gift, bequest, devise, or inheritance. * * *"

construed. Commissioner v. Jacobson, 336 U. S. 28, 48; Helvering v. American Dental Co., 318 U. S. 322, 329.

The practical test which the courts have applied in cases where income has been claimed to have been a gift is to determine if the income was received gratuitously and in exchange for nothing. Helvering v. American Dental Co., supra, at page 330; Old Colony Tr. Co. v. Commissioner, 279 U. S. 716, 730; Bausch's Estate v. Commissioner, 2 Cir., 186 F. 2d 313, 314; Thomas v. Commissioner, 5 Cir., 135 F. 2d 378, 379; Sportwear Hosiery Mills v. Commissioner, 3 Cir., 129 F. 2d 376, 382; Willkie v. Commissioner, 6 Cir., 127 F. 2d 953, 955, certiorari denied 317 U. S. 659. The trial court reasoned that the income was a gift because the composition was not written for the purpose of entering it in the contest and not for the purpose of receiving the prize but for the satisfaction he would derive as an artist, that the donor furnishing the prize money derived no financial benefit from the contest, and that the Detroit Orchestra, Inc., which received rights in connection with the composition did not receive the same in exchange for the prize. We think that the court's conclusion was erroneous. It may be that when the taxpayer composed the symphony [fol. 53] his only purpose was to satisfy, as he described it, an "urge" which came upon him, and did not have in mind receiving income from it. The composition was, however, the result of his professional skill and training as a musician, and later when he read in the press of the "extraordinary awards" which were to be given to winners in this contest, it is incorrect to say that he was not offering the results of his professional skill to win prize money or that he would not accept it if his entry was declared the winner. For this purpose he selected "Trilogy" from his files and entered it in the contest. In addition to this he gave to the Detroit Orchestra, Inc., rights which are described in the entry terms. (See note 2, supra.) The fact that these rights had not previously been of value is immaterial. Although we think it was, we do not base our decision upon the narrow ground that the relinquishment of these rights was a consideration sufficient to determine the issue. We are of the opinion that when a person, such as here, submits the result of his skill and training in a contest and receives a prize, the

necessary elements of a gift as contemplated by the statute are not present. It cannot be said that the prize was entirely gratuitous or received in exchange for nothing. In this case the prize was won as a result of over three years professional effort of the taxpayer. The fact that the award may come from a tax exempt organization or from a nontaxable fund is generally immaterial. The taxability of the prize or award is to be determined in accordance with the law applicable to the person receiving it. Reichhold may not have received anything tangible for giving the award but the recipient received the prize as a result of his labors just as much as though he had sold it or had been paid for its use. The award may have been made for the purpose of giving assistance to or for the promotion of a nonprofit organization or for some educational or charitable purpose, nevertheless it is income to the individual who receives it by winning a contest by or for such organization.

The trial court relied upon the case of McDermott v. Commissioner, CADC, 150 F. 2d 585, as does the taxpayer here, but we think the majority of the court in that case placed [fol. 54] too much importance on the donative intent of the nonprofit association and on the nonpecuniary motive of the taxpayer. In a proper case there may be elements to be considered in determining if the receipt of a thing of value is a gift for tax purposes, but they are not necessarily controlling factors. We do not believe that the dominant motive of a contestant for a prize such as was given in a case like this is not a hope of immediate financial gain and that he himself is not exchanging services or its product for money. Nor do we believe that we can say that one entering this sort of a contest does it purely for the advancement of art or scholarly pursuits, if so, the contestant could well refuse to accept the prize. We hold that when a person enters a contest, such as in this case, which offers a valuable award and the contestant wins and accepts that award, its value is taxable to him. Stein v. Commissioner, 14 T. C. 494.

The Commissioner in his deficiency notice determined that the income should be taxed in accordance with 26 U. S. C. A. 107 (b), ratably over the years 1946, 1947 and 1948. The taxpayer contends that under the terms of the statute